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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1515

LOCAL 17, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Petitioner,

vs.

PARAMOUNT TRANSPORT SYSTEMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner, Local 17, International Longshoremen's and Warehousemen's Union ("Local 17") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 27, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It is unofficially reported at 91 L.R.

R.M. 2375. A copy of the judgment of the Court of Appeals is appended to this petition as Appendix A. A copy of the opinion of the Court of Appeals is appended to this petition as Appendix B. A prior opinion of the Court of Appeals in this case is reported at 436 F.2d 1064 and is appended to this petition as Appendix C. The District Court rendered no opinion. The order of the District Court granting a partial summary judgment during an earlier phase of this case is unofficially reported at 76 L.R.R.M. 2424 and a copy of it is appended to this petition as Appendix D. The decision of a trial examiner in a prior unfair labor practice proceeding under section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4) (the Act) is unreported. A copy of it is appended to this petition as Appendix E. The National Labor Relations Board issued no separate opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 27, 1976. A timely petition for rehearing was denied on March 10, 1976. This petition is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether this Court's decision in *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966) does not require the exclusion from evidence,

in a suit under Section 303 of the Act, 29 U.S.C. 187, of that portion of a trial examiner's decision, in a prior unfair labor practice proceeding under Section 8(b)(4) of the Act, which purported to find that petitioner's unfair labor practice was the proximate cause of respondent's damages, since such a finding was neither upon an issue relevant to the Section 8(b)(4) proceeding nor was it, as required by this Court's decision in *Universal Camera Corporation v. NLRB*, 340 U.S. 474 (1951), supported by substantial evidence on the record before the trial examiner.

2. Whether, in view of this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *Local 20, Teamsters' Union v. Morton*, 377 U.S. 252 (1964), a labor organization may be required to pay damages for an injury resulting from a combination of both lawful primary activity and unlawful secondary activity, without proof that the unlawful activity materially contributed to, or was a substantial factor in bringing about, the damages.

STATUTORY PROVISIONS INVOLVED

Section 303 of the Act, 29 U.S.C. 187 reads:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act . . . .
>
> (b) Whoever shall be injured in his business or property by reason of any violation of sub-

section (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Section 8(b)(4) of the Act, 29 U.S.C. 158(b)(4) reads in relevant part:

It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this

clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

STATEMENT OF THE CASE

The case arose out of efforts by Teamsters Local 150 (a labor organization independent of, and different from, petitioner) to obtain a collective bargaining contract covering the employees of respondent, Paramount Transport Systems (PTS), a Sacramento, California trucking concern. During the course of the Local 150's concededly lawful and peaceful picketing from January 16, 1968 to March 5, 1968, petitioner became involved in one incident which was later found by a trial examiner of the National Labor Relations Board to have been a violation of section 8(b)(4) of the Act. This was on January 16, 1968, when one of respondent's trucks with a load of Campbell Soup products appeared at the McDowell Warehouse to be unloaded. Local 150 picketed the truck and one of petitioner's shop stewards told a McDowell employee not to unload it. The shop steward also told McDowell's superintendent and general manager that petitioner's members would not handle PTS trucks while they were being picketed by Local 150.[1]

---

[1]Another incident not involving petitioner, which occurred on January 22, at the premises of National Ice and Cold Storage Company, was found by the trial examiner to be a violation by Local 150 of section 8(b)(4). A third incident also not involving petitioner, which occurred at Boone's Warehouse, was not found to have been a violation of the Act.

As we show below, it was the incidents at National and Boone's which were the cause of Campbell's brief termination of respondent's services.

While respondent was not certain of its precise loss as a result of the refusal of the McDowell employee to unload that one truckload, it conceded that it would not have exceeded $500 (Tr. 242). Yet, as we shall see below, a verdict of $75,000 was rendered against petitioner and a judgment based thereon was affirmed on appeal.

During the ensuing weeks Local 150 engaged in picketing the PTS facility, followed PTS trucks and engaged in ambulatory picketing of PTS trucks at the Campbell Soup facility and at Boone's Warehouse (*supra,* n. 1). All of this concededly lawful, peaceful activity is no basis upon which any claim for damages may be granted. *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966); *Local 20, Teamsters' Union v. Morton,* 377 U.S. 252 (1964).[2]

After the incidents at National Ice and Boone's (*supra,* n. 1) and during the time that Local 150 was picketing respondent's premises and following its trucks in support of Local 150's legitimate efforts to obtain a contract (i.e., from January 22 to March 5), Campbell did not give respondent any loads to pick up or deliver. However, when the picketing ceased on

[2]In conformity with these decisions, the Court of Appeals for the Eighth Circuit has recently stated:

> The objective of the Union action was to place direct economic pressure on Federal in order to accede to the Union's demands which had their origins in the working conditions and pay schedules in Federal's plant. Such a strike in support of lawful demands is, of course, permissible. Its restrictive impact, should such occur, upon suppliers and contractors is predictable and not unlawful. *Federal Prescription Service v. Amalgamated Meat Cutters, etc.,* 527 F.2d 259, 274 (8 Cir. 1975).

March 5,[3] Campbell once again resumed business with respondent and thereafter treated it exactly as it would have done had there been no prior picketing by Local 150. By April of 1968 Campbell was using respondent's services "back on a normal basis . . . substantially [to] the same extent [as] . . . before there was any picketing" (Tr. 624); ". . . now in April it is on a normal basis again" (Tr. 625).[4]

Later in 1968, in August or September, Campbell was itself shut down by a labor controversy—which involved its own employees and did not involve either Local 150 or petitioner. Due to this shutdown, Campbell was unable to provide business for respondent and in September of 1968 respondent went out of business. Had this not happened, Campbell would have continued to engage respondent's services after Campbell's own difficulties were resolved (Tr. 252).

Respondent filed a charge with the National Relations Board alleging that petitioner had violated section 8(b)(4) of the Act by the conduct at the McDowell warehouse on January 16.[5] After a hearing, the trial examiner found that, by the conduct of its shop steward on January 16 at the McDowell Warehouse, petitioner had violated section 8(b)(4) of the Act.

[3]All picketing was terminated when an injunction was issued by the district court pursuant to section 10(l) of the Act, 29 U.S.C. 160(l), on the basis of the incidents at McDowell's and National Ice.

[4]"Tr." refers to the reporter's transcript of the district court proceedings in the 303 action.

[5]On the basis of the National Ice incident, of January 22, *supra,* n.1, respondent also charged that Local 150 had violated the same section of the Act.

(App. E, pp. 29-35). The trial examiner, however, did not stop there. He made the unnecessary, immaterial and gratuitous finding that raises the principal (but not the only) question presented by this petition. He went on to find that, as a result of this unfair labor practice, Campbell ceased doing business with PTS. As we show below, such a finding was not a material issue in, nor was it supported by substantial evidence on the record of, the administrative hearing and therefore should not have been given the collateral estoppel effect which it was given in this 303 action subsequently filed by respondent against both Local 150 and petitioner.

Relying on the trial examiner's decision, respondent moved in this 303 action for a partial summary judgment which was granted. This judgment, however, was limited to that portion of the decision of the trial examiner which had found that petitioner's activities at McDowell violated section 8(b)(4) (App. D, pp. 16-17). It did not decide, but specifically left open, the question of whether this activity caused any damage to respondent (id., p. 15). On an interlocutory appeal a different panel of the court below from the one which decided this appeal affirmed this limited summary judgment. *Paramount Transport Systems v. Chauffeurs, Teamsters and Helpers Local 150, et al.*, 436 F.2d 1064 (9th Cir. 1971), because:

> . . . collateral estoppel effect . . . should be accorded . . . to those findings upon material issues that are supported by substantial evidence upon the administrative record as a whole. 436 F.2d 1066; App. C, p. 11.

On the trial, however, respondent offered in evidence the trial examiner's entire decision, including that portion of it which dealt with the question of causation on the ground that it was "res judicata as to all issues in this proceeding" and, specifically, that "the conclusions . . . with reference to the proximate cause . . . of Campbell Soup terminating its relationship with [respondent] has [sic] already been determined by the Board and may not be re-examined in this proceeding." (Tr. 88). Petitioner objected to that portion of the trial examiner's decision which reads as follows:

> E. *Campbell's Reaction*
>
> *Due to the inability of PTS to deliver its canned goods from its factory to McDowell* and to pick up its raw vegetables from National for delivery to its factory (and its inability to make other pickups and deliveries of Campbell products or goods), on January 29, *Campbell informed [PTS] it could no longer use PTS' services.* From that date Local 150 confined its picketing to the PTS terminal. Tr. 135; Pl. Ex. 6, p. 7; App. E, p. 35; italics supplied.

Petitioner's objection was that the finding of the trial examiner that Campbell informed PTS that it could no longer use PTS' service "[d]ue to the inability of PTS to deliver its canned goods from its factory to McDowell" was not a finding upon a material issue, nor was it supported by substantial evidence upon the administrative record as a whole. (Tr. 94-108, 112-119). In support of its objection, petitioner specifically offered to prove by the administra-

tive record (Tr. 131, 134; Def. Exs. A and B for identification) that "there is no support in [that] record" for this finding and that it "is not material to the issue in the unfair labor practice proceeding. . . ." (Tr. 120). The objection was overruled and the entire decision, including the foregoing excerpt, was admitted in evidence (Tr. 135) and was specifically submitted to the jury at its request during its deliberations. (Tr. 786-787).

Apart from this "finding" there is no evidence in the record to establish that the incident at the McDowell Warehouse on January 16, the only incident involving petitioner, had anything to do with Campbell's decision not to use respondent's services between January 22 and March 5 or that the damages claimed by respondent were proximately caused by petitioner's unfair labor practice. Respondent's own testimony in this 303 suit was that after the incident at McDowell's on January 16, Campbell continued to send respondent business but that after respondent was "unable to complete the haul at National Ice on January 22" Campbell ceased to call upon it (Tr. 73). Petitioner was not involved in the National Ice incident on January 22, *supra,* n. 1).[6]

[6]An ex parte affidavit (Tr. 328, Pl. Ex. 8), submitted in the 10(l) injunction proceeding (*supra,* n.3) by one McReynolds, a Campbell employee, who was deceased at the time of the 303 suit, does make reference to the earlier incident. However, the affidavit is unambiguous that it was the failure to "pick up the full shipment from the National Ice warehouse on or about January 22, 1968, and the picketing by Teamsters 150 at premises where Paramount trucks made pick ups or deliveries" that accounted for the termination of Campbell's business relationship with respondent from January 22 to March 5 (Tr. 745). As noted above, petitioner was not involved in, and was not responsible for, the incident of January 22 at National Ice; also it was not responsible for, nor was it involved in, any Teamster picketing which in any case was lawful, peaceful ambulatory picketing of respondent's trucks. As McReynolds was alive at the time of the NLRB hearing, the affidavit was not there used. McReynolds' live testimony before the trial examiner was that it was the National Ice incident and the one at Boone's Warehouse (in neither of which petitioner was involved) which caused Campbell to discontinue, from January 22 to March 5, utilizing respondent's services (Tr. 620). Respondent's testimony before the trial examiner was that "the reason for this is the attempted pick up that we made was refused from National Ice and from Boone's Warehouse. Therefore they had to bring in other carriers . . . rather than using Paramount . . ." (Tr. 321).

Respondent's counsel relied exclusively upon the trial examiner's "finding" to make out the element of proximate cause. In his opening argument to the jury he read the finding verbatim and asserted that the issue of proximate cause had already been decided adversely to petitioner: *"The NLRB has already found the connection, so you don't have to go into that question."* (Tr. 663). In his closing argument he said: "But, actually even reading that [the McReynolds ex parte affidavit, *supra,* n. 6] is an exercise in futility, for the simple reason that *it's already been legally determined by an agency that Congress gave power to make the determination about what proximate cause was . . ."* (Tr. 745-6); and, after reading the finding verbatim once again in his closing argument, he said that the jurors had to *"recognize the decision of the National Labor Relations Board made on the same subject on substantial evidence as to what the proximate cause was."* (Tr. 746). Their failure to do so *"would certainly be going afoul of your duty as jurors"* (id.) (all italics supplied).

Respondent's counsel also argued to the jury that petitioner was "wholly liable" for all of respondent's damages because they stemmed from "all the facts accumulated together" (Tr. 753)—lawful and unlawful.

There was no finding of a conspiracy between the two unions nor was one union found to be the agent of the other. To the contrary, the jury returned separate verdicts: for $75,000 against petitioner; for $275,000 against Local 150.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH UNITED STATES v. UTAH CONSTRUCTION AND MINING COMPANY, 384 U.S. 394 (1966) AND WITH UNIVERSAL CAMERA CORPORATION v. NLRB, 340 U.S. 474 (1951).

(a) This Court has been careful to confine the collateral estoppel effects of administrative findings only to those findings which are "clearly relevant to the issue properly before [the agency]." *Utah Construction, supra,* 422.[7]

The "finding," on the basis of which damages were awarded against petitioner, was that "[d]ue to the inability of PTS to deliver its canned goods from its

[7]On the interlocutory appeal, a panel of the court below, composed of different judges from those who sat in the instant case, recognized that "collateral estoppel effect . . . should be accorded *only* to those findings upon *material issues* that are supported by substantial evidence upon the administrative record as a whole." 436 F.2d 1066; App. C, p. 11 (italics supplied). As the subsequent discussion in the text demonstrates, the panel which decided the instant appeal did not follow this salutary rule of law.

factory to McDowell . . ., Campbell informed [PTS] it could no longer use PTS' services," *supra,* p. 9. This "finding" was made in an unfair labor practice proceeding under Section 8(b)(4) of the Act. The question is whether such a finding was "clearly relevant to the issue properly before [the trial examiner]."

Petitioner submits that it clearly was not. The issue in a Section 8(b)(4) proceeding is only whether a labor organization engaged in the proscribed conduct with a proscribed objective. It is not "clearly relevant" to any issue in such a proceeding that the proscribed conduct did or did not have any harmful effect upon anyone. The NLRB case against petitioner was proven when the trial examiner found that petitioner had engaged in the proscribed conduct, with a proscribed objective. His gratuitous observation that it was "due to" that conduct that Campbell advised PTS that it could no longer use its services was not material to any issue before him.

While this Court has not directly addressed this narrow question in this form, it seems clear that its decisions must be read as holding that whether a charging party loses business "due to" the activities of a respondent is not "clearly relevant" to the issue before the Board in an 8(b)(4) proceeding. Compare *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612, 627 (1967); *NLRB v. Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, 72 (1964); *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675, 678 (1951).

The courts of appeals have consistently so held:

NLRB v. Teamsters Local 901, 314 F.2d 792, 794 (1 Cir. 1963) ("an unsuccessful attempt" is a violation);

NLRB v. Associated Musicians, 226 F.2d 900, 904 (2 Cir. 1955) *cert. den.* 351 U.S. 962 (1956) ("Respondents argue . . . where no actual strike . . . ensues, no violation can be found. This view . . . is supported neither by common understanding of the meaning of those [statutory] words nor by authority").[8]

Local 542, International Union of Operating Engineers v. NLRB, 328 F.2d 850, 852 (3 Cir. 1964), *cert. den.* 379 U.S. 826 (1964) (a proceeding under section 8[b] [1]) ("The test . . . is not whether the misconduct proved effective").[9]

NLRB v. United Hatters, etc. Union, 286 F.2d 950, 952 (4 Cir. 1961) (the fact that secondary employees did not cease working "is not proof of absence of the invitation" and the Board's order is enforced).

[8]This circuit has also held that picketing does not violate the Act "merely because it is shown to be coercive in effect . . ." It is the objective not the result that is relevant. *NLRB v. Knitgoods Workers' Union, Local 155,* 267 F.2d 916, 919 (2 Cir. 1959).

[9]This circuit, citing *National Woodwork Manufacturers Association v. NLRB, supra,* has also held that if the objective is "proper" the Act does not apply; picketing does not violate the Act "regardless of the severity of the impact." *NLRB v. Local Union 164, International Brotherhood of Electrical Workers,* 388 F.2d 105, 107 (3 Cir. 1968).

NLRB v. Dallas General Drivers, Local No. 745, 264 F.2d 642, 648 (5 Cir. 1959), *cert. den.* 361 U.S. 814 (1959) (". . . the lack of success is immaterial.").

National Cash Register v. NLRB, 466 F.2d 945, 961 (6 Cir. 1972), *cert. den.* 410 U.S. 966 (1973) (a proceeding under section 8[b] [1]) ("a violation. . . can be found even when the coercion does not prove effective").

Lescher Building Service, Inc. v. Local Union No. 133, 310 F.2d 331, 336 (7 Cir. 1962) (a suit under section 303) ("An attempt . . . is all that need be proved.").

The district courts similarly hold when the issue is presented to them in injunction proceedings under Section 10(l) of the Act:

Cuneo v. Local 742, 175 F.Supp. 131, 135 (D. N.J. 1959) (". . . picketing is an inducement, the legality of which is not determined by its effectiveness . . .").

Alpert v. Local 1066, 166 F.Supp. 22, 25 (D. Mass. 1958) ("The test is one of purpose, not effect.").

The NLRB itself has long recognized that a violation of Section 8(b) (4) is made out irrespective of whether or not the proscribed conduct has adverse effect. *Laundry Cleaning & Linen Workers Local and Apex Linen Service,* 127 NLRB 11, 15 (1960), *affirmed* 286 F.2d 430 (6 Cir. 1960). Board Member Kennedy has clearly stated the rule:

> It is likewise settled that no proof of success or effectiveness of picketing in creating a work

> stoppage is necessary in order to establish a violation. *Plumbers, etc. Local 155* and *The Kroger Co.*, 195 NLRB 900, 901 (1972).[10]

Thus it is clear that the trial examiner's "finding" that, "due to" the incident at McDowell, Campbell terminated its business with respondent was not "clearly relevant to the issue properly before [him]."

We cannot believe that this Court wishes to permit to stand the new rule adopted by the second panel of the court of appeals here, that it is a material issue in an 8(b)(4) proceeding that the proscribed conduct resulted in damage and that therefore Section 8(b)(4) is violated only if it is proved that picketing for a proscribed objective was the proximate cause of damage—or conversely, that, in any case in which there is no proof that picketing for a proscribed objective proximately caused damage, a Section 8(b)(4) violation is not established.

The Section 8(b)(4) violation is not dependent upon proof of proximate cause of damage. Therefore the finding of proximate cause was immaterial and should not have been given collateral estoppel effect.

A panel of the court below flatly disagreed:

> Due to such successful restraint, Campbell terminated its relationship with Paramount. That is exactly what happened and it is what the trial examiner found. App. B, p. 7.

[10]While the quoted language appears in a dissenting opinion, the views expressed were expressly adopted by the court of appeals. *The Kroger Co. v. NLRB*, 477 F.2d 1104, 1108 (6 Cir. 1973) and, upon remand, were adopted by the Board. *Plumbers, etc. Local 155* and *The Kroger Co.*, 209 NLRB 341 (1974).

But "what the trial examiner found" was on an immaterial issue and should not have been given collateral estoppel effect either before the jury or in the court below. Insofar as the panel said, "That is exactly what happened", the simple answer is that apart from the trial examiner's finding there is no evidence in the record to support that conclusion, *supra*, n. 6; *infra*, p. 18.

The opinion of the court below, like the verdict of the jury, is premised entirely and exclusively upon this immaterial finding of the trial examiner.[11]

The failure of the court below to limit the collateral estoppel effect of the trial examiner's decision to those findings which were "clearly relevant" to the issues before him is contrary to the rule stated by this Court in *Utah Construction, supra.* The effect of its holding is that it is necessary in an 8(b)(4) proceeding to prove that the proscribed conduct had an adverse effect on the charging party before it can be found that an unfair labor practice has been committed. Such a holding is contrary to the view of this Court, to the decisions of other courts of appeals and to the decisions of the district courts and the Labor Board itself.

[11]The opinion below lacks clarity and consistency. Having said what we have quoted in the text, the panel also said that the trial examiner did not find that petitioner's unfair labor practice was the proximate cause of respondent's damages, but "only" that petitioner's act caused "Campbell Soup to terminate its business with Paramount." (App. B, p. 7). It acknowledged that this factor "may well have played a major role," and said that the proximate cause had to be established by "other independent evidence." (id.). The trouble with this is that there was no such "other evidence"—independent or otherwise.

(b) There is another reason why the "finding" should not have been given collateral estoppel effect: it was not, as required by *Universal Camera Corporation v. NLRB,* 340 U.S. 474 (1951), supported by substantial evidence on the record before the trial examiner.[12] Indeed it was supported by no evidence at all in that record.

The *only* evidence of the effect of the unfair labor practices upon Campbell's business relations with respondent which appears in the administrative record came from respondent and from McReynolds.

Respondent testified before the trial examiner:

> ". . . the reason for this is the attempted pick up that we made was refused from National Ice and from Boone's Warehouse, therefore, they had to bring in other carriers . . . rather than using Paramount . . ." (Tr. 321).

McReynolds testified before the trial examiner:

> ". . . the only conversations I can remember were on shipments that we had where we had ordered products in from National Ice and Boone's that were being affected by pickets." (Tr. 620).

This is the totality of the evidence before the trial examiner as to why Campbell informed respondent

[12]As we have previously noted (*supra,* n.7), a panel of the court below held, on the interlocutory appeal, that "collateral estoppel effect . . . should be accorded *only* to those findings upon material issues *that are supported by substantial evidence on the administrative record as a whole.*" 436 F.2d 1066; App. C, p. 11 (italics supplied). The instant panel did not follow this holding.

that it could no longer use respondent's services.[13] It clearly does not, as required by *Universal Camera, supra,* support a "finding" that "[d]ue to the inability of PTS to deliver its canned goods from its factory to McDowell . . ., Campbell informed [PTS] it could no longer use PTS' services."

Not only is there no substantial evidence to support that administrative finding; there is simply none at all.

For this reason, too, the finding should not have been given collateral estoppel effect.

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2. THE DECISION BELOW CONFLICTS WITH UNITED MINE WORKERS v. GIBBS, 383 U.S. 715 (1966) AND WITH LOCAL 20, TEAMSTERS UNION v. MORTON, 377 U.S. 252 (1964).

This Court has been careful to confine damages awardable under section 303(b) to those which occur only "by reason of a violation of subsection (a)", i.e., only to those damages which are the proximate result of the unlawful secondary activity.

> The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) comprehensively and with great particularity "describes and condemns specific union conduct directed to specific objectives." Carpenters Local 1976 v. Labor Board, 357 US 93, 98. In selecting which forms of economic pressure should be prohibited by §303, Congress struck

[13]The ex parte affidavit of McReynolds (*supra,* n.6) was not part of the administrative record. McReynolds was alive and testified before the trial examiner. That affidavit cannot be considered in determining whether the *Universal Camera* test has been met in this case.

> the "balance . . . between the uncontrolled power of management and labor to further their respective interests," id., 357 US at 100, by "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and [by] shielding unoffending employers and others from pressures in controversies not their own." Labor Board v. Denver Bldg. & Construction Trades Council, 341 US 675, 692. (*Teamsters Local 20 v. Morton, supra,* 258-259.)

In *Morton,* the union had engaged in activity in violation of Section 303. It also had engaged in activity not violative of that section (id., 255). This Court affirmed an award of compensatory damages for the loss directly due to the 303 violation (id., 256). However, in reversing the judgment for other damages which had been granted upon the reasoning of the trial court, that the employer was entitled to recover damages "measured by all of the profits lost as a result of [the union's] total strike activity so long as some of that activity was unlawful" (id., 255), this Court said:

> Since §303(b) authorizes an award of damages only in the event of injury "by reason of any violation of subsection (a)" and peaceful primary strike activity does not violate §303(a), Electrical Workers Local 761 v. Labor Board, 336 US 667, 672, the District Court was without power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere. See Chauffeurs Local 175 v. Labor Board, 294 F2d 26. (id., 261-262.)

In *Morton,* which was tried to the court, it was relatively easy to deal with the damage question because the consequences of the illegal conduct were readily separable from those of the legal conduct—they had their impact on totally different customers of the employer (id., 255).

In *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), however, the problem was more difficult—the case was tried to a jury and the consequences of the unlawful conduct were harder to separate from those of the lawful conduct. Furthermore, in that case the unlawful conduct, i.e., two days of violence, was the basis for a pendent jurisdiction claim based on state law. This Court sustained the trial court's jurisdiction over that claim because section 303 has not preempted state claims based upon violence. (383 U.S., 721-729).

Nonetheless in reversing the judgment against the union this Court specifically agreed with the argument that "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." (id., 729).

> Where the consequences of peaceful and violent conduct are separable . . ., it is clear that recovery may be had only for the latter. (id., 732).

The decision below cannot be squared with the foregoing principles of *Morton* and *Gibbs.* So far as concerns petitioner here, the only conduct violative of Section 303 was the single incident at McDowell's

Warehouse on January 16. At the most, petitioner was responsible for any damages respondent may have suffered "by reason of" that conduct. Petitioner's liability was to be "strictly confined to the direct consequences of such conduct" (*Gibbs, supra*) and the district court was "without power to award damages proximately caused by lawful . . . activities." (*Morton, supra*).

Although there was evidence in *Gibbs* that the union had engaged in two days of unlawful (i.e., violent) activities, this Court reversed the judgment because the employer's counsel did not limit his jury argument to that (383 U.S., 733) and because the trial court's instructions "[did] not focus the jury's attention upon violence or threats of violence as the essential predicate of any recovery it might award" (383 U.S., 735).

Here, too, counsel for respondent did not limit his argument to the claim that respondent was entitled to recover from petitioner damages which resulted from the one incident involving petitioner. To the contrary, he argued:

> I say, some of what they did was legal, but some of what they did was illegal, *and these coupled together,* did what they set out to do. . . ." (Tr. 670).

And responding to petitioner's argument, he said:

> But, some of the methods we used were legal, some of the methods we used were illegal. *Now, I don't think that's any defense whatsoever, because when the cumulative affect of legal conduct and illegal conduct brings about a result, both represent approximate* [sic] *cause of the harm, and as long as the illegal conduct was a proximate cause of damage to this man, even though other conduct was also a proximate cause, the defendants are wholly liable.* That's the law. It isn't that the defendants' conduct, illegal conduct must be the sole proximate cause, because there can be more than one cause, there can be what we call concurrent proximate causes, and wherever that situation arises, *full liability can attach* to each of the proximate causes.[14] (Tr. 743; all italics supplied).

The trial court adopted this erroneous theory and instructed in almost the same words as used by respondent's counsel. Thus, although here the evidence was that petitioner had engaged in only one incident of 303 activity at the McDowell warehouse (which respondent admitted could not have caused it more than $500 damages [*supra,* p. 6]), the instructions did not focus the jury's attention on that incident as

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[14]There was also evidence that unknown persons had caused physical damage to some of respondent's property. Although this was no part of the 303 case against petitioner, respondent argued to the jury ". . . we've never claimed that we know who poured the sugar in his tanks, yet the testimony is undisputed that five pounds of sugar was put in each, I think, each of three tractors that fouled the tanks. There is undisputed evidence that it cost $9,000.00 to rebuild those motors to renew them. This is expensive equipment. All right. It took a long time to get it redone, you can't redo that in a moment. Also thirty-one tires were slashed. Now, these are obligations that this man has to meet before he can get back into business. *So, it's not just a loss of business in January that puts him behind the eight-ball, it's also all of these accumulated together and because they were accumlated together the man cannot ever recover from it.*" (Tr. 753; italics supplied).

the essential predicate of any recovery it might award against petitioner. To the contrary, the jury was told that while it must find that the incident at McDowell was a proximate cause of respondent's damages,

> This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause. (Tr. 772)

It is clear that here, the "factors or things or conduct of two or more persons," which were operating at the times in question were not only the incident at McDowell, but Local 150's unlawful activity at National Ice, its lawful activity at Boone's Warehouse and at Campbell and at the places where respondent's trucks were being followed, the unrelated shut down at Campbell itself and some unidentified violence (*supra,* n. 14). To tell the jury that each of these may be a proximate cause is not, in this 303 suit, to focus sufficiently upon the limited scope of recovery which Congress intended to allow in damage suits under this section of the law.

As a different panel of the court noted in a recent case:

> The rules of causation imported into the statutory scheme through the "by reason of" language of section 303 afford a means of dealing with at least the extremes of the problem. The requirement that the unlawful objective must have "materially contributed" to the loss or have been a "substantial factor" in bringing it about, will prevent windfall recoveries by employers negligibly affected by a violation, and protect the union's right to strike for primary objectives where such objectives, standing alone, would have caused the strike, but the unlawful objective, standing alone, would not. Restatement (Second) of Torts § 432; W. Prosser Law of Torts § 41, at 238-40 (4th ed. 1971); 2 F. Harper & F. James, Torts § 20.3, at 1121-23 (1956).
>
> *Mead v. Retail Clerks Int. Assn.* 523 F.2d 1371, 1379 (9 Cir. 1975).[15]

The trial court here never told the jury that the sole incident in which petitioner was involved had to have materially contributed to or had to have been a substantial factor in bringing about respondent's loss before it could render a verdict against petitioner.

The judgment, in an amount one hundred and fifty times the actual damage suffered by respondent for the loss it sustained as a result of petitioner's one unlawful act was a "windfall" recovery against petitioner and cannot be squared with this Court's holdings in *Morton* and *Gibbs.*

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[15]The Court of Appeals for the Eighth Circuit has recently stated the rule to be that the plaintiff must show that damages would not have occurred "but for" the Union's illegal conduct. *Federal Prescription Service v. Amalgamated Meat Cutters, etc.,* 527 F.2d 269, 280 (8 Cir. 1975).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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San Francisco, California,
April 20, 1976.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
For The Ninth Circuit

No. 74-2382
Civ S-638

Paramount Transport Systems,
Plaintiff-Appellee.
vs.
Chauffeurs, Teamsters & Helpers
Local 150, et al.,
Defendants-Appellants.

[Filed March 24, 1976]

Appeal from the United States District Court for the Eastern District of California (Sacramento)

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered January 27, 1976

Appendix B

United States Court of Appeals
For The Ninth Circuit

No. 74-2382

Paramount Transport Systems,
Plaintiff-Appellee,
vs.
Chauffeurs, Teamsters & Helpers
Local 150, et al.,
Defendants-Appellants.

[January 27, 1976]

Appeal from the United States District Court
for the Eastern District of California

OPINION

Before: TRASK and SNEED, Circuit Judges, and
EAST,* Senior District Judge

EAST, Senior District Judge:

The defendants-appellants, Local 150, and the defendants-appellants, Local 17, (Unions) each appeal from a substantial several judgment entered in a National Labor Relations Act, 29 U.S.C. § 187, action for damages sustained by the plaintiff-appellee, above

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

named, (Paramount), and resulting from the Unions' joint unfair labor practices as defined by 29 U.S.C. § 158(b)(4). We affirm.

At an early stage, the District Court granted a summary judgment in favor of Paramount on the issue of the Unions' liability for unlawful labor relations practices. This court, on the Unions' interlocutory appeal from the summary judgment, recited that the trial examiner in a prior § 158(b)(4) hearing had found that:

> "Local 150 was not certified as the bargaining representative of a majority of employees of Paramount. Further, picketing and *other interference by Locals 17 and 150 had taken place.* [Italics supplied]. Finally, [the trial examiner] determined that the picketing was an unfair labor practice, *i.e.,* an unlawful secondary boycott. No exceptions to the trial examiner's decision was filed and it became final.
>
> ". . . .
>
> "The district court was of the opinion that a determination of the trial examiner that an unfair labor practice has occurred is binding on the district court as a trier of facts. Based upon language in *United States v. Utah Construction & Mining Co.,* 384 U.S. 394 . . . (1966), the district judge applied general principles of collateral estoppel."

This court then concluded that:

> "We believe that the district court correctly applied *United States v. Utah Construction & Mining Co., supra,* to foreclose the union from litigating in this action those material issues of

fact decided adversely to it in the proceedings culminating in a final order by the National Labor Relations Board." *Paramount Transport Sys. v. Chauffeurs, etc. Local 150,* 436 F.2d 1064 (9th Cir. 1971).

Thereafter a jury trial was held on the issue of Paramount's damages. The District Court received in evidence and submitted to the jury as conclusive on the issue of the Unions' liability the entire opinion of the trial examiner in the § 158(b)(4) proceedings, which included, *inter alia,* Finding of Fact E as follows:

> "Due to the inability of [Paramount] to deliver [Campbell Soup's] canned goods from its factory to McDowell [warehouse] and to pick up its raw vegetables from National for delivery to its factory (and [Paramount's] inability to make other pickups and deliveries of Campbell products or goods), on January 29, Campbell informed Hayashida [Paramount's owner] it could no longer use [Paramount's] services."

The Unions' some four variously phrased assertions of error on this appeal center around the District Court's utilization of Finding of Fact E in connection with the jury issue of the proximate cause of Paramount's damages. We state the sole meritorious issue on review as:

> Did the District Court err in receiving into evidence and submitting to the jury Finding of Fact E on the issue of Paramount's alleged damages?

We conclude that the District Court did not so err.

We will not entertain a collateral attack upon Finding of Fact E as not being supported by relevant evidence as this court has held that "[n]o exceptions to the trial examiner's decision were filed and it became final."

The Unions insist that Finding of Fact E was not "findings upon material issues" before the trial examiner in the § 158(b)(4) unfair labor practice charges and, therefore, the Finding is not entitled to "collateral estoppel effect" under the language of *Paramount Transport Sys., supra,* at 1066, *viz*:

> "But we do not construe *Utah Construction* to require that the doctrine of collateral estoppel be applied across the board to all determinations of such issues by administrative agencies. Reading *Utah Construction* with *United States v. Carlo Bianchi & Co.,* 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963), we conclude that collateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of procedural and substantive due process that attend a valid judgment by a court and further, that such effect should be accorded only to those findings upon material issues that are supported by substantial evidence on the administrative record as a whole."

We do not subscribe to such a narrow construction of the "collateral estoppel effect" of the specific Finding of Fact E involved in these proceedings.

We are convinced that the quoted caveat as to application of the doctrine to across the board deter-

minations by administrative agencies places no restrictions or limitations upon the direct explicit holding in this case that the Unions are foreclosed "from litigating in this action those material issues of fact decided adversely to it in the proceedings culminating in a final order by the . . . Board." *Paramount Transport Sys., supra* at 1065-66.

Futhermore, the Unions' argument that the effect or result of the unlawful strike activities or conduct by the Unions was not material to the issues involved in the § 158(b)(4) unfair labor practices charges is fallacious and untenable.

The trial examiner found and determined that the "picketing and other interference by Locals 17 and 150 . . . was an unfair labor practice. *i.e.,* an unlawful secondary boycott," and, further, that as a part of the other interferences, the workers at the warehouses at the direction of the Unions refused to unload and load Campbell Soup shipments from or on Paramount trucks, which in turn caused Campbell Soup to discontinue Paramount's services, the very object and culmination of Unions' unfair labor practice to coerce and restrain Paramount's lawful trucking business.

We agree that a violation of the Labor Management Relations Act occurs only when wrongful purpose is combined with (1) threat, (2) coercion, or (3) restraint.

In this case, neither union threatened to do anything. Each simply did that which was unlawful. They restrained the McDowell and National Ice employees from loading Campbell's goods as long as they were

hauled by Paramount. Due to such successful restraint, Campbell terminated its relationship with Paramount. That is exactly what happened, and it is what the trial examiner found. Since actual restraint and not a mere threat was involved, the finding was not only on a material issue, but it was on a necessary issue.

We take it that Unions' main claim against the receipt of the trial examiner's decision and specifically Finding of Fact E in evidence and its submission to the jury is that the proximate cause of Paramount's damage is thereby conclusively established. We disagree. It is manifest that neither the trial examiner in his decision nor the Board in its order found as a fact or determined as of law that the Unions' unfair labor practices and Paramount's loss of Campbell Soup's business thereby were the proximate cause of Paramount's going broke and its resulting damage. The trial examiner and the Board found only that the Unions' illegal acts causing Campbell Soup to terminate its business with Paramount was an unfair labor practice of coercion and restraint.

The established fact of the cause of and the actual loss of Campbell Soup's business may well have played a major role; nevertheless the direct proximate cause of Paramount's going out of business and resulting damage had to be established by other independent evidence.

We have perused the jury instructions and are satisfied that the District Court instructed that Finding of Fact E was only conclusive as to the question of whether the Unions had practiced unlawful strike

activities and the jury was fairly and fully instructed on the appropriate measure of damages to be considered in determining the amount of damages, if any, directly and proximately resulting from the unlawful labor practice. We note that the District Court did not instruct that the trial examiner's Finding of Fact E was conclusive on the issue of proximate cause, nor did the District Court place undue emphasis or weight upon that evidentiary item. The weight of Finding of Fact E upon the ultimate proximate cause of Paramount's damage was well and fully argued, pro and con, by counsel.

The several judgments entered on December 21, 1974 against Local 17 and Local 150, respectively, are each affirmed.

AFFIRMED.

Appendix C

United States Court of Appeals,
Ninth Circuit.

No. 25719

Paramount Transport Systems, a corporation,
Plaintiff and Appellee.
vs.
Chauffeurs, Teamsters & Helpers, Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.,
Defendants and Appellants.

[Jan. 6, 1971]

Before: CHAMBERS, JERTBERG, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

Paramount Transport Systems brought this action pursuant to section 303 of the Labor Management Relations Act, 29 U.S.C. § 187. The district court judge granted Paramount's motion for partial summary judgment on liability. We granted appellants' application for an interloctutory appeal under 28 U.S.C. § 1292(b).

Paramount filed an unfair labor practices charge with the National Labor Relations Board alleging

violations of section 8(b) (4) of the Labor Management Relations Act, 29 U.S.C. § 158(b) (4). Hearings were held on April 25 and 26, 1968. On November 4, 1968 the trial examiner's decision was rendered. He found that Local 150 was not certified as the bargaining representative of a majority of employees of Paramount. Further, picketing and other interference by Locals 17 and 150 had taken place. Finally, he determined that the picketing was an unfair labor practice, *i.e.,* an unlawful secondary boycott. No exceptions to the trial examiner's decision was filed and it became final.

Paramount filed its first amended complaint on April 8, 1968, alleging damages suffered as a result of the above unfair labor practices. On January 14, 1970, Paramount filed its motion for partial summary judgment which was granted on March 11, 1970. No suggestion is made that the issues before the Board and before the court were different, except in court the damage issue was added.

The district judge was of the opinion that a determination of the trial examiner that an unfair labor practice had occurred is binding on the district court as a trier of facts. Based upon language in United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the district judge applied general principles of collateral estoppel.

We believe that the district court correctly applied United States v. Utah Construction & Mining Co., *supra,* to foreclose the union from litigating in this action those material issues of fact decided adversely

to it in the proceedings culminating in a final order by the National Labor Relations Board. But we do not construe *Utah Construction* to require that the doctrine of collateral estoppel be applied across the board to all determinations of such issues by administrative agencies. Reading *Utah Construction* with United States v. Carlo Bianchi & Co., 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963), we conclude that collateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of procedural and substantive due process that attend a valid judgment by a court and further, that such effect should be accorded only to those findings upon material issues that are supported by substantial evidence on the administrative record as a whole.

Affirmed.

CHAMBERS, Circuit Judge (concurring):

I concur in the result. *Utah and Carlo Bianchi, supra,* dealt with the review of findings of the Armed Services Board of Contract Appeals. The Wunderlich Act, 41 U.S.C. § 321, provides that the decision of the board shall be final and conclusive unless fraudulent, capricious, arbitrary, so grossly in error as to imply bad faith or not supported by substantial evidence. Read in light of this congressional dictate, these cases indicate that the findings of the board relevant to a dispute properly before it must be accepted if supported by substantial evidence in the record considered as a whole. The same test should be applied to

the instant question, assuming compliance with procedural and substantive due process. Application of collateral estoppel piles test upon test. This is unnecessary. If the butcher has no meat, he need not determine if the meat is spoiled.

Appendix D

U.S. District Court,
Eastern District of California

Paramount Transport Systems v. Chauffeurs, Teamsters & Helpers Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al., No. S-638, March 11, 1970.

FULL TEXT OF OPINION

WILKENS, District Judge:—The case arises under Section 303 of the National Labor Relations Act (29 U.S.C.A. Section 187), which confers jurisdiction on the U.S. District Courts in such civil actions. This is an action for damages suffered as a result of unfair labor practices as defined by Section 8(b)(4) of the Act (29 U.S.C.A. Section 158(b)(4)). There is presently before the Court a motion on the part of plaintiff for partial summary judgment. This motion requests that the doctrine of res judicata be applied to the issues of fact properly before the National Labor Relations Board (NLRB) which the parties have had an adequate opportunity to litigate.

I. Legal Issue on Motion

At this stage, the only question presented is:

In a civil suit for damages allegedly suffered as a result of an unfair labor practice (an unlawful secondary boycott) is the determination of the NLRB

that such an unfair labor practice has occurred to be considered res judicata and therefore binding on the District Court as trier of fact?

II. Factual Background

The plaintiff, a corporation engaged in the trucking business, claims that the allegedly unlawful activities of agents of the two unions have caused it to be deprived of the contracts it had to haul goods for the Campbell Soup Company.

Teamsters Local 150, in answer to plaintiff's original complaint, denied picketing at one of plaintiff's delivery points, the Bert McDowall Company, denied acting in concert with ILWU Local 17, denied attempting to induce National Ice & Cold Storage not to load one of plaintiff's trucks, denied attempting to force or require various persons to cease using, selling, handling or otherwise dealing in the products of the plaintiff, and to cease doing business with him, and in conclusion denied that as a proximate result of its acts the plaintiff's business had been disrupted and Campbell and other persons had ceased to do business with it. The Pre-Trial Order took the issue of whether picketing had occurred out of the case. As per the Pre-Trial Order, the following issues were left in dispute:

Issues of law and fact

(a) Whether Local 150 represented a majority of plaintiff's truck drivers in 1968;

(b) Whether any picketing or other concerted activities of Local 150 at Bert McDowall Company con-

stituted a secondary boycott in violation of Section 8(b)(4) of the National Labor Relations Act;

(c) Whether any picketing or other activities of Local 150 at Bert McDowall Company caused any employees of Bert McDowall Company to refuse to handle freight hauled by plaintiff;

(d) Whether any picketing or other activities of Local 150 at National Ice & Cold Storage Company constitute a secondary boycott in violation of Section 8(b)(4) of the National Labor Relations Act;

(e) Whether any picketing or other concerted activities of Local 150 at National Ice & Cold Storage Company caused employees of said firm to refuse to handle freight to be hauled by plaintiff;

(f) Whether Local No. 17 engaged in conduct at the Bert McDowall Company which constituted a secondary boycott in violation Section 8(b)(ii)(B) or 8(b)(4)(i)(B) of the National Labor Relations Act;

(g) If the activities of Local No. 17 are found to be in violation of either or both of the aforementioned sections of the National Labor Relations Act, the amount of damages, if any, caused to plaintiff by said activities;

(h) Whether Campbell Soup Company curtailed business with plaintiff as the result of any secondary boycott activities by defendants, or either of them;

(i) The nature and extent of damages to plaintiff caused by its reduction of business with Campbell Soup Company which may be attributed to secondary boycott activities by defendants, or either of them;

(j) The nature and extent of plaintiff's damages caused by all of the activities of defendants which are found to be illegal under provisions of Section 8(b) and 303 of the National Labor Relations Act;

(k) Whether plaintiff is entitled to reasonable attorney's fees for services of its attorneys related to unfair labor practice charges against defendants in NLRB proceedings, and the reasonable amount of said services.

The plaintiff's motion for partial summary judgment results from the fact that it has already procured a Decision and Order from the NLRB concerning this matter. Attorneys for all parties on the hearing of this motion for partial summary judgment advised in answer to the Court's direct question that on April 25 and 26, 1968, a hearing was held before the Trial Examiner for the NLRB, that plaintiff and both defendants in the instant action were represented by attorneys that represent them in this case, and that all parties appeared and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, present argument and submit briefs. It was further stated that there was no question but that it had been a full, fair, adequate, and complete hearing on issues within the admitted scope of NLRB competence. Examination of the Decision and Order reveals that the Board found as follows:

(1) That Local 150 was not the certified representative of the PTS employees.

(2) That both Locals by inducing and encouraging employees of Campbell and McDowall to refuse to

handle products of Campbell in order to force Campbell to cease transporting its goods by PTS and to force PTS to recognize and bargain with Local 150 as representative of its employees despite the absence of Section 9 certification, violated Section 8(b)(i)(B) of the NLRA.

(3) That Local 17 by threatening, coercing or restraining Campbell Soup with an object of forcing or requiring Campbell to cease handling the products of PTS, of forcing Campbell to cease transporting its goods by the trucker of its choice, and by forcing PTS to recognize and bargain with Local 150 as a representative of the trucker's employees despite the absence of a Section 9 certification as the majority representative thereof, violated Section 8 of the Act. See Decision and Order of NLRB page 10.

III. Statement of Issues

In sum, the NLRB found that (1) picketing and other interference by Locals 17 and 150 had taken place, (2) that the picketing was an unfair labor practice, i.e., an unlawful secondary boycott, because (3) Local 150 was not certified as bargaining representative of a majority of employees of PTS.

The question here presented is whether the Decision and Order of the NLRB is to be given effect in this trial on these three questions which remain in dispute among the parties along with certain other issues as set out above in the quotation from the Pre-Trial Order.

IV. Discussion of Authorities

There is no binding Ninth Circuit or U.S. Supreme Court holding on the res judicata effect of administrative tribunal decisions in civil cases. Authority in other circuits is divided. However, in my opinion, the better reasoning favors giving res judicata effect to the decision of the NLRB.

In United States v. Utah Construction & Mining Co., 384 U.S. 394, 422, the court discussed the question as follows:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. (Citations omitted.)
>
> In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.

Defendants state that this statement of the court is only dictum and not holding. Technically speaking, this is correct. The basis of the administrative finding in Utah Construction was the provision of the contract and the provision of the Wunderlich Act

regarding arbitration of disputes under Federal contracts. Nevertheless, two things can be said:

First, as the court's language at 384 U.S. 421 shows, the court in this decision thought it was following the general principles of collateral estoppel. That is, an arbitrator's decision as to facts and legal issues was held to be binding on the court in a civil case. Considering the court's language, I think that it is probable than an NLRB decision would be an a fortiori case for the application of res judicata. That is, the proceedings of the NLRB are even closer in form, procedure, and objective to those of a court than are those of an arbitrator. Therefore an NLRB decision should get the same consideration from a court.

There is no Ninth Circuit holding on this question. ILWU v. Juneau Spruce Corp., 189 F.2d 177, 28 LRRM 2064 (C.A. 9, 1951) does not support the defendants' position. This case does not consider the question of res judicata effect of NLRB decisions. There is no reference to the concept of res judicata in the opinion, nor can it be said by any logical inference to rest implicitly on the concept. All this case means is that a civil action for damages need not be ruled upon a decision of the NLRB, inasmuch as such a decision was held not to be a jurisdictional prerequisite to the civil action.

Other authorities cited by the defendant in opposition to the motion may also be disposed of.

Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Union, 359 F.2d 598, 62 LRRM 2007 (C.A. 2, 1966) may be rejected as not being a considered

opinion. There is no indication that the matter of res judicata was briefed or argued in a trial court. Only passing consideration was given to the question in footnote 7. No reasoning or policy analysis is offered in support of the court's opinion. There is only a blank citation of a Sixth Circuit opinion on the question.

Neither is United Brick Workers v. Deena Artware, 198 F.2d 637, 30 LRRM 2485 (C.A. 5, 1952) to be properly considered a case of refusal to apply res judicata. Once again there is no indication that the doctrine was invoked and considered at trial. The case simply holds that even though an NLRB decision and a court decision arising out of the same issues in a labor dispute are inconsistent, neither one need be set aside on appeal to the Circuit Court, inasmuch as both bodies are independent tribunals and the appellate court cannot set aside either decision where supported by substantial evidence, even though they are inconsistent. The court did not say that the Labor Board decision could not have been presented and held binding in the civil suit. It is not stated whether this was even attempted.

Painter's District Council No. 38, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO v. Edgewood Contracting Co., 416 F.2d 1081, 72 LRRM 2524 (C.A. 5, 1969), is persuasive authority for the "modern view" that res judicata effect should be given. Edgewood was a suit alleging damages suffered by plaintiff on account of defendant

union's alleged unfair labor practices, an unlawful secondary boycott as in this case. The district court concluded that the prior determination of the NLRB was res judicata as to liability, and defendant union appealed. The Court of Appeals held that the prior determination of the NLRB that the local union was guilty of a secondary boycott was res judicata on the question of liability in a subsequent damage suit, where the Board had conducted a full hearing wherein the same parties were present and represented by counsel, with full opportunity to present evidence, and to call, examine and cross-examine witnesses. The opinion of the Fifth Circuit Court in this case analyzed the case of United States v. Utah Construction & Mining Co., the opinion of the Supreme Court cited above. The opinion of the Fifth Circuit indicates that it thought that it was following the reasoning of the Supreme Court in this case. The approach is described as on of analysis of the underlying factors which makes res judicata applicable. The court then went on to quote the administrative law treatise of Professor Davis and said that both he and the Supreme Court were following the same method of analysis, that is, an analysis of the underlying policy factors. These policy factors are as follows:

1. Finality to litigation.

2. Prevention of needless litigation.

3. Avoidance of unnecessary burdens of time and expense.

The court stated that there is no difference in the underlying principles simply because the administrative decision is sought to be given effect in a judicial proceeding. The court also analyzed United Brick & Clay Workers v. Deena Artware, Inc., the opinion of the Sixth Circuit cited above and relied on by defendants. The court first noted that this opinion predated Utah Construction by 14 years, and secondly, in any event, was not contrary to is own conclusion inasmuch as it was not a res judicata case.

Finally, the court also discussed the opinion of the Ninth Circuit in ILWU v. Juneau Corporation, discussed above. The Fifth Circuit said that this case was also not a res judicata case, rather it simply held that Board action was not a condition precedent to a civil suit for damages.

V. Conclusion

In view of the reasoning of the Supreme Court in Utah Construction and the holding of the Fifth Circuit in Edgewood, it would appear that the best course is to give res judicata effect to the NLRB decision. Such a decision would also be supported by the basic policies underlying the res judicata doctrine.

It Is Therefore Ordered That plaintiff's motion for a partial summary judgment be, and the same is, hereby granted.

It Is Further Ordered that the Pre-Trial Order shall be modified before trial to conform with this opinion.

Appendix E

United States of America
Before The National Labor Relations Board
Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CC-762

Teamsters Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and International Longshoremen's and Warehousemen's Union, Local 17.

and

Paramount Transport System, Inc.

TRIAL EXAMINER'S DECISION

Statement of the Case

GEORGE CHRISTENSEN, Trial Examiner: On January 17,[1] Paramount Transport System, Inc., hereafter PTS, filed a charge alleging that Teamster's Local 150, hereafter Local 150, and Longshoremen's Local 17, hereafter Local 17, had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, hereafter the Act, on varying dates earlier in January by causing or attempting to cause various employees to cease handling products intended for

[1]All dates refer to 1968 unless otherwise noted.

transport by PTS and by causing or attempting to cause various companies to cease doing business with one another, for the ultimate purpose of bringing pressure upon PTS to recognize and bargain with Local 150 as the collective-bargaining representative of certain PTS employees. On February 8, a complaint was issued adopting the substance of the charges. On February 13, both locals filed answers denying the commission of any unfair labor practices.

Either by answer or stipulation, it was agreed that PTS, Campbell Soup Co., hereafter Campbell, National Ice and Cold Storage Company, hereafter National, and Bert McDowell Company, hereafter McDowell, at all times pertinent were employers engaged in commerce and in business affecting commerce, that the two locals were labor organizations within the meaning of the Act, that National stored, McDowell sold, and PTS transported Campbell's goods, that Howard Yeager and Cecil Tobin, hereafter Yeager and Tobin, at all times pertinent were agents of Local 150 acting on its behalf, and that from August of 1967, Local 150 sought recognition from and collective bargaining with PTS as the collective-bargaining representative of certain PTS employees.

Local 17 denied that Bill Rathbun, hereafter Rathbun, was its steward at McDowell's premises and its agent acting upon its behalf.

The issues presented are: (1) whether in January Rathbun was Local 17's agent acting on its behalf as its job steward at McDowell's premises; (2) if so, whether on or about January 16, Local 17 by Rathbun threatened McDowell that Local 17's members employed by McDowell would refuse to unload Campbell goods delivered by PTS and told a McDowell employee not to unload or otherwise handle Campbell goods delivered by PTS; (3) whether on or about January 16, Local 150, by Tobin, picketed McDowell's premises; (4) whether on or about January 22, Local 150, by Yeager, told a National employee not to load or otherwise handle Campbell goods for carriage by PTS to Campbell's Plant; and (5) if so, whether commission of any of the acts attributed to Local 17 and Local 150 violated Section 8(b)(4)(i) or (ii)(B) of the Act.

A hearing was held at Sacramento, California, on April 25 and 26. All parties appeared and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, present argument and submit briefs. Briefs were submitted by the General Counsel and Local 150. Based upon his review of the entire record, observation of the witnesses and study of the briefs, the Trial Examiner makes the following:

FINDINGS OF FACT

I. Jurisdiction and Labor Organization

PTS is a California corporation headquartered at Sacramento, California, engaged in the transportation of various commodities by truck. It annually performs services valued in excess of $50,000 for Campbell which in turn annually sells and ships goods valued in excess of $50,000 directly to customers outside of California.

Local 150 and Local 17 represent their members for the purpose of bargaining collectively with their employers concerning their wages, hours and working conditions.

The complaint alleges, Local 150 and 17 admit, and the Trial Examiner finds that PTS is an employer engaged in commerce and in a business affecting commerce and Locals 150 and 17 are labor organizations within the meaning of Section 2(2), (5), (6) and (7) of the Act.

II. The Unfair Labor Practices

A. *Background*

Robert Hayashida, the owner and operator of PTS, began business in October of 1965. Prior to going into the trucking business, he had been employed as a truckdriver and as a dispatcher by various trucking firms in the area, including Frank's Trucking Service, which at one time did most of Campbell's hauling. Campbell at times pertinent to this proceeding was PTS' major customer. PTS regularly hauled canned soup from Campbell's factory to McDowell, a wholesale grocer, and raw vegetables from National, a cold storage company, to the Campbell factory.

In August of 1967, Yeager contacted Hayashida and requested that he sign a standard Local 150 contract covering certain PTS employees. Hayashida told Yeager he could not sign the contract because he was in debt and unable to afford the increased labor cost the contract would require. They agreed to discuss the matter further about a week later. At

the second meeting, Yeager again proffered the contract and asked Hayashida to sign it. Hayashida asked Yeager to give him more time to get his business established, suggesting 1 to 1½ years. Yeager refused, saying he had orders to sign Hayashida up. Hayashida refused to sign.

On August 6, Local 150 secured an authorization and sanction from Teamsters Joint Council 38, which includes Teamster locals in Sacramento and the San Joaquin Valley, to strike PTS for a contract.

Local 150 did not take any further action until January 11, when Yeager contacted Hayashida and asked if he was ready to sign the contract. Hayashida repeated his original remarks. Yeager then informed Hayashida if he did not sign immediately Local 150 would begin picketing the following Tuesday (January 16). Hayashida told Yeager to picket if he must, he still wasn't going to sign.

That same day or the day after, Yeager telephoned Hugh McReynolds, Campbell's transportation manager, and told him Local 150 intended to picket PTS' trucks commencing January 16. Carl Olson, secretary-treasurer of Local 150, made a similar call to Leland McManus and John Mullin, National's superintendent and vice president, respectively.

On Monday, January 15, Tobin contacted Hayashida, presented the contract, and again asked Hayashida to sign it, stating that pickets would be put on PTS the next day unless he signed. Hayashida refused.

The next day pickets arrived at the PTS terminal carrying signs reading "PARAMOUNT TRANSPORT SYSTEM (OR PTS) UNFAIR TO TEAMSTERS LOCAL 150 OPERATING WITHOUT A UNION CONTRACT." They picketed the terminal and followed PTS trucks as they left the terminal, picketing them at each of their stops, including Campbell,[2] McDowell and National.

Not long thereafter, Local 150 sent a telegram to Hayashida claiming (for the first time) that it represented a majority of PTS' employees and demanding recognition and a contract.[3]

B. *The McDowell Incidents*

PTS delivered Campbell canned goods to McDowell's dock the morning the picketing began (January 16). A McDowell forklift operator, Gene Collier, began unloading the goods and transporting them into the warehouse. Collier was a member of Local 17. Meanwhile, Yeager and Tobin arrived at the McDowell premises in separate cars. Yeager stationed Tobin and other pickets outside McDowell's gate and proceeded to the dock area where Collier was working. Collier called Rathbun, ceasing work while Rathbun and Yeager spoke. Yeager told Rathbun Local 150 was conducting an authorized and sanctioned strike

[2]There are no allegations that Local 150's picketing activity at the premises of Campbell and employers other than McDowell and National exceeded *Moore Dry Dock* standards (92 NLRB 547).

[3]On petition by PTS, the Board conducted an election in February at which a majority of employees indicated they did not desire representation by Local 150.

against PTS and showed Rathbun a written document issued by Joint Council 38 sanctioning Local 150's strike. Rathbun turned to Collier, informed him Local 150 was engaged in a sanctioned strike against PTS, that there was an agreement between Local 17 and Local 150, and instructed Collier not to unload the PTS truck (it was about ¼ unloaded).[4]

Yeager was introduced to McDowell's warehouse superintendent, Vern Osborn, and its general manager, Lee Canterbury, by Bob Crandall, the Local 150 business representative assigned to service Local 150 members employed by McDowell.[5] Yeager informed Osborn and Canterbury Local 150 had a dispute with PTS, was picketing PTS' trucks, and showed them the Joint Council 38 sanction. He told them Local 150 pickets would remain as long as PTS trucks remained at McDowell's premises, and would leave when the PTS trucks left. Rathbun told Osborn and Canterbury that his instructions were that Local 17 members would not handle PTS' trucks when picketed by Local 150.[6] Yeager offered to move the pickets from the gate to the trucks if Osborn would give permission for the pickets to enter on McDowell's premises. Osborn left to check with higher authority

[4]These findings are based on the credited testimony of Collier, whose position was more objective than that of Yeager (Rathbun did not testify). While Collier tended to hedge his testimony on cross-examination by counsel for Local 17 (which is understandable in view of his membership therein), his testimony on direct, which is credited, was clear and unequivocal.

[5]Part of McDowell's employees were represented by Local 17 and part by Local 150.

[6]Since Rathbun did not testify, Osborn's testimony to this effect was undisputed and is credited.

and, upon his return, accepted Yeager's offer. Yeager brought Tobin to the dock and Tobin took up a picket station at the PTS truck. He wore a sash containing the word "PICKET" and carried a picket sign.

Osborn informed the PTS driver he had been advised that Local 17 members would not unload his truck as long as it was picketed and he might as well leave. Osborn also instructed Collier to return the Campbell goods previously unloaded to the PTS truck. Collier complied. The truck and Tobin left.

When Local 150 pickets and Yeager subsequently appeared at Campbell's premises, William Haley, personnel manager at Campbell, queried Yeager as to the reason. Yeager stated Local 150 had a dispute with PTS, pointed out there were PTS trucks there, and stated whenever there were PTS trucks there, Local 150's pickets would be there. Yeager also informed Haley that Local 150 had an agreement with the warehouse local (Local 17) at McDowell not to handle PTS freight and that the Teamster and Warehouse people had so informed McDowell.[7]

[7]Yeager testified that he was referring to a joint agreement between the Teamsters and the Warehousemen equalizing warehouse employee rates and conditions in the area for warehouse employees represented by the two organizations, denying any agreement with regard to the handling of any struck freight. His testimony is not credited. Haley had no knowledge of the prior events at McDowell and Yeager's comments concerning Rathbun's notice to Osborn that Local 17 would not handle freight consigned for carriage by PTS trucks to or from McDowell per agreement between Locals 17 and 150 obviously contain specifics there would have been no need to mention in a general discussion of an area standards agreement between the two organizations. Haley's testimony is credited.

Later in the day the same PTS trailer Collier had partially unloaded and reloaded reappeared at McDowell, this time hauled by a Control Freight tractor (Hayashida had arranged for the substitution in the hope delivery could thereby be accomplished). The tractor and trailer had to wait for some time in the parking area for a loading dock to become available. Word reached Tobin of its presence and he arrived at the shipping clerk's office at McDowell before a dock opened. When a dock subsequently became vacant, the Control Freight driver approached the clerk's window to deliver the freight bill prior to unloading. The clerk, Fred Arfstein, noted that it was the same shipment which PTS had attempted to deliver earlier and stated if it was up to him, he would not unload it. The driver nevertheless pulled the trailer into the open dock. Tobin followed it over. When Collier saw Tobin who he knew to be the same person who had picketed the PTS shipment in the morning and saw the trailer contained the same load he had partially unloaded and reloaded (there were markings on the crates he had made himself), he told the driver he could not unload until PTS' trouble with the Teamsters was straightened out.

Osborn and Canterbury also came to the dock and Tobin pointed out to them that the trailer was the same PTS trailer that had been there that morning, and still carried the same load. Osborn left and returned with McGill, McDowell's purchasing department director. Tobin was still there. Osborn told the driver that the steward of the warehouse union (Local

17) had advised him the warehousemen would not unload the trailer and requested that he leave. The driver pulled the trailer away and Tobin left with it. Tobin neither carried a picket sign nor wore a picket sash during this encounter.[8]

C. *Rathbun's Agency*

At all times pertinent, Rathbun was a duly recognized steward of Local 17; acted on behalf of Local 17's members employed at McDowell in processing grievances before duly designated management representatives, including execution of settlement agreements thereof; acted as a conduit between Local 17 and its members employed at McDowell, advising the Union of matters the members wished brought to its attention and advising the members of the Union's position on various matters affecting them; and was looked to by the members and McDowell management as the Union's official representative and spokesman.[9]

D. *The National Incident*

National's warehousemen at all times pertinent were represented by Local 150.

About January 11, Local 150 Secretary-Treasurer Carl Olson telephoned National's superintendent, Le-

[8]Tobin testified unequivocally he carried a sign and wore a sash in the morning, but left his sign in his car and carried his sash in his pocket in the afternoon because he was unsure as to whether he should picket a Control Freight tractor. Osborn, Canterbury, McGill and Collier saw him with a sign and sash but were not sure if he used them on both occasions.

[9]These findings are based on the undisputed testimony of Osborn and Collier.

land McManus, and informed him that Local 150 was organizing PTS' employees and would be picketing PTS trucks the following week. McManus pointed out that National was a public warehouse and would have to load or unload any truck which had business to transact with National. Olson replied that Local 150's business representatives would instruct its members employed at National what to do.

About January 22, National Vice President John Mullin telephoned Local 150 Business Representative Jack Martin to check on the status of Local 150's dispute with PTS. Martin told Mullin Local 150's pickets were following PTS' trucks and Local 150 would appreciate any cooperation National could give. Mullin replied that since National was a public cold storage house, it could not refuse service to anyone, though Local 150's business representatives were free to talk to their members employed by National. On that same date, a PTS truck arrived at National's premises to pick up 90 barrels of okra which had been stored by Campbell and were intended for delivery to Campbell's factory. Gene Jimenez, a forklift operator employed by National and a Local 150 member, proceeded to load the truck. While the loading was proceeding, Yeager telephoned Mullin and said his pickets had advised him that a PTS truck was at National and said he would appreciate it if National did not load the truck. Mullin replied that there wasn't any picket at National and anyway the truck was almost loaded. Yeager said his pickets were outside the plant, since they had instructions not to enter onto National's

property. Mullin repeated his statements regarding National's status as a public warehouse and Local 150's right to talk to its members employed by National. Yeager said he would be right there. By the time Yeager arrived, all but 2 of the 90-barrel order had been loaded. Yeager stationed two pickets with signs and sashes at the gate (they had been sitting in their car, not sure where to picket), and proceeded into the yard, where he was met by McManus. The two discussed the purpose of the picketing. Yeager asked McManus not to load the truck. McManus said to say that to his own member (Jimenez), not to him. McManus called to Jimenez and advised Yeager that was his man. The three went towards the warehouse; Yeager and Jimenez proceeded inside and McManus veered off towards his office. After they went inside, Yeager handed Jimenez his business card, introduced himself as a Local 150 business representative, explained to Jimenez that Local 150 had a dispute with PTS, and instructed Jimenez not to load any more PTS trucks. Jimenez returned to the yard and told the PTS driver, John Edd, that the Local 150 business representative told him not to load the truck and he was not going to put any more barrels on (the load was short 2 barrels). Jimenez did not see any pickets prior to his conversation with Yeager and based his refusal to finish the load solely on Yeager's orders.[10]

[10]These findings are based upon the mutually corroborated testimony of Edd, Jimenez and McManus; Yeager's testimony that *McManus* told Jimenez to stop loading is rejected.

E. *Campbell's Reaction*

Due to the inability of PTS to deliver its canned goods from its factory to McDowell and to pick up its raw vegetables from National for delivery to its factory (and its inability to make other pickups and deliveries of Campbell products or goods), on January 29, Campbell informed Hayashida it could no longer use PTS' services. From that date Local 150 confined its picketing to the PTS terminal.

F. *Discussion and Conclusions*

In the context of this case, a violation of Section 8(b)(4)(i)(B) is made out if Local 17 by Rathbun as its agent and Local 150 by Yeager and Tobin as its agents encouraged McDowell employee Collier and National employee Jimenez to refuse to handle Campbell goods hauled by PTS to force McDowell and National to cease doing business with Campbell, and/or to force Campbell to cease doing business with PTS, and/or to force PTS to recognize and bargain with Local 150 despite its lack of Board certification as the majority representative of PTS employees. A violation of 8(b)(4)(ii)(B) is made out if Local 17, by Rathbun as its agent, and Local 150, by Yeager, Olson, Martin or Tobin as its agents, threatened or coerced management representatives of McDowell, National or Campbell to force McDowell and/or National to cease doing business with Campbell, and/or to force Campbell to cease doing business with PTS, and/or to force PTS to recognize and bargain with Local 150 despite its lack of Board certification as the majority representative of PTS' employees.

The status of Yeager, Tobin, Olson and Martin as authorized agents acting on behalf of Local 150 is conceded; while Local 17 contended Rathbun was not its agent acting on its behalf, it is clear from the findings entered heretofore (IL. C. above) that Rathbun possessed and exercised full authority as Local 17's designated representative and was accepted and dealt with as such both by Local 17's members employed at McDowell and by McDowell's management. The Examiner therefore finds and concludes that Rathbun was Local 17's agent acting upon its behalf in his communications to Collier and Osborn, to be treated in detail subsequently.

It is conceded that at all times pertinent Local 150 was seeking recognition from and bargaining with PTS as the exclusive collective-bargaining agent of certain PTS employees, and that at no time was it certified under Section 9 of the Act as the majority representative of such employees. It is likewise conceded that PTS, Campbell, McDowell and National are engaged in commerce and in a business affecting commerce.

It is clear from the several conversations between Hayashida and Yeager that Local 150: picketed the PTS terminal, contacted the managements of the major user of PTS' services (Campbell) and business houses from and to which PTS hauled goods (including McDowell and National), picketed PTS trucks wherever they went and contacted employees handling shipments carried by PTS trucks, all for the purpose of forcing PTS to yield to Local 150's demand for recognition and execution of its standard contract.

All contacts with management in the course of achieving such an object are not unlawful; courteous solicitations of cooperation which do not contain any element of threat or coercion are not violative of Section 8(b)(4)(ii)(B) of the Act; announcement of the dispute by signs carried by pickets at a terminal or at or near trucks when the nature of the employer's business justifies ambulatory picketing in order to publicize the dispute is not violative of Section 8(b)(4)(i) or (ii)(B), and conversations with employees in which the facts or circumstances of the dispute are explained are not violative of Section 8(b)(4)(i)(B).

The key questions presented are whether statements of Yeager, Tobin, Martin, Olson and Rathbun to various management officials contained unlawful elements of restraint, threat or coercion and whether statements of Yeager to Jimenez and Rathbun to Collier contained unlawful elements of inducement or encouragement.

In the judgment of the Examiner, none of the statements of Olson, Yeager, Tobin or Martin were threatening or coercive. In the course of Yeager's January 11 telephone conversation with McReynolds of Campbell, Olson's January 11 telephone conversation with McManus of National, Yeager's January 16 direct conversation with Osborn and Canterbury of McDowell, Yeager's January 16 direct conversation with Haley of Campbell, Tobin's January 16 direct conversation with Osborn and Canterbury of McDowell, Martin's January 22 telephone conversation with Mullin of National, and Yeager's January 22 telephone conversation with Mullin of National, the

language used was polite and conciliatory; in each case, the Local 150 representative simply informed the management official to whom he spoke of the existence of the dispute with PTS, Local 150's intention to picket PTS trucks as they made their rounds, and solicited the cooperation of the various companies.[11] The Examiner therefore finds and concludes that Local 150 did not by any of the words or actions of its representatives named above violate Section 8(b)(4)(ii)(B) of the Act.

Rathbun, however, went further. After Yeager on the morning of January 16 showed Rathbun the written strike authorization he had secured from Joint Council 38, Rathbun informed management officials Osborn and Canterbury of McDowell that his instructions were that Local 17 members would not handle any freight carried by a PTS truck whenever such truck was picketed by Local 150. He also informed the forklift operator (a Local 17 member) who had

[11]The General Counsel contends that during the afternoon of January 16 when PTS made its unsuccessful attempt to deliver Campbell's goods by substituting a Control Freight tractor and driver to bring in the trailer McDowell had failed to unload in the morning, Tobin engaged in "picketing" the truck and trailer without carrying a sign indicating Local 150's dispute with PTS, that he thereby failed to meet *Moore Dry Dock* picketing standards, and therefore violated Section 8(b)(4) of the Act. The Examiner has entered findings that Tobin was not engaged in picketing activities; that he did not picket because he was unsure of his legal right to do so and remained silently in the area when Collier informed the Control Freight driver he would not unload him on recognizing the shipment and Tobin; Tobin only spoke when Osborn appeared to advise Osborn that it was the same shipment that PTS had attempted to deliver in the morning. Such communication does not rise to the status of a threat, restraint or coercion of Osborn and Tobin's mere presence hardly constitutes encouragement or inducement of Collier.

been unloading a PTS truck at the McDowell dock that there was an agreement between Local 17 and Local 150, and instructed him not to unload the PTS truck. In the judgment of the Examiner, Rathbun, as an authorized agent and spokesman for Local 17, by stating to McDowell management officials that he, either carrying out instructions from the Local or issuing his own instructions as its representative, was instructing McDowell employees represented by Local 17 not to handle any freight carried by PTS, thereby restrained, threatened or coerced Osborn and Canterbury and their principal, McDowell, with an object of aiding Local 150's effort to force McDowell to cease doing business with Campbell, to force Campbell to cease doing business with PTS, and to force PTS to recognize and execute a contract with Local 150 as the representative of its employees. By so doing, Local 17 violated Section 8(b)(ii)(B) of the Act.[12]

With regard to employee encouragement or inducement, the Examiner has entered findings that on January 22 Yeager told Jimenez, an employee of National, not to load a PTS truck with certain Campbell products; and that on January 16 Rathbun told Collier, an employee of McDowell, not to unload a PTS trailer containing certain Campbell products.

[12]Local 150 ingenuously contends that since McDowell and National were not "doing business" with PTS, it and Local 17's actions could not be held to be violative of Section 8(b)(4)(i) or (ii)(B) of the Act. Local 150 misconceives the thrust of the provision—it bars forcing "any person" to cease doing business with or handling the products of *"any other person"*—thus it is immaterial that no privity existed between McDowell, National and PTS.

Based on those and the earlier findings set out herein, the Examiner finds that Local 17 by Rathbun on January 16 induced and encouraged Collier, an employee of McDowell, to engage in a refusal in the course of his employment to handle Campbell's goods to force or require McDowell to cease handling the products of Campbell, to force Campbell to cease transporting its goods by PTS, and to force PTS to recognize and bargain with Local 150 as the representative of PTS employees despite the absence of any Section 9 certification of Local 150 as majority representative of such employees, thereby violating Section 8(b)(4)(i)(B) of the Act.

On the same grounds, the Examiner finds that on January 22, Local 150 by Yeager induced and encouraged Jimenez, an employee of National, to engage in a refusal in the course of his employment to handle Campbell's goods to force or require National to cease handling the products of Campbell, to force Campbell to cease transporting its goods by PTS, and to force PTS to recognize and bargain with Local 150 as the representative of PTS employees despite the absence of any Section 9 certification of Local 150 as the majority representative of such employees, thereby violating Section 8(b)(4)(i)(B) of the Act.

Conclusions of Law

1. McDowell, National, Campbell and PTS are employers engaged in commerce and in businesses affecting commerce and Locals 17 and 150 are labor organizations within the meaning of Section 2(2)(5), (6) and (7) of the Act.

2. The activities of Locals 17 and 150 occurring in connection with their activities set forth above have a close, intimate and substantial relation to trade, traffic and commerce among the several States and, absent correction, will lead to labor disputes burdening and obstructing commerce and the free flow thereof.

3. Locals 17 and 150 by inducing and encouraging employees of employers engaged in commerce and in businesses affecting commerce to engage in a refusal in the course of their employment to handle the products of others with an object of forcing their employers to cease handling the products of another employer, to force the latter to cease transporting its goods by the trucker who brought them to the premises of their employers, and to force the trucker to recognize and bargain with Local 150 as the representative of its employees despite the absence of Section 9 certification as majority representative thereof, as set out heretofore, violated Section 8(b)(i)(B) of the Act.

4. Local 17 by threatening, coercing or restraining an employer in commerce and in a business affecting commerce with an object of forcing or requiring such employer to cease handling the products of another employer, of forcing such employer to cease transporting its goods by the trucker of its choice, and by forcing the trucker to recognize and bargain with Local 150 as the representative of the trucker's employees despite the absence of a Section 9 certification as the majority representative thereof, as set out heretofore, violated Section 8(b)(ii)(B) of the Act.

The Remedy

Having found that the two Locals have engaged in unfair labor practices, the Examiner recommends that they be ordered to cease and desist therefrom and to take the affirmative action of posting notices for the attention of their members and employers whose employees they represent at places where such notices will be seen by such persons and to maintain such notices for a reasonable time thereafter. The Examiner will recommend dismissal of paragraph VII(c) of the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, and upon the entire record in the case, the Examiner recommends that Locals 17 and 150, their officers, agents, successors and assigns, be ordered to cease and desist from inducing or encouraging any employees of National or McDowell or any other person engaged in commerce or in a business affecting commerce to engage in a refusal in the course of their employment to cease handling the goods of any other person with an object of forcing National, McDowell or other persons to cease handling the products of Campbell or any other producer, processor or manufacturer, or to force Campbell or any other person to cease doing business with PTS or any other person, or to force PTS or any other employer to recognize and bargain with Local 150 as the representative of its employees in the absence of a Section 9 certification of Local 150 as the majority representative thereof. The Examiner further recommends that Local 17, its officers, agents, successors and assigns, be ordered to cease and desist from threatening, coercing or restraining McDowell or any other person engaged in commerce or in a business affecting commerce with an object of forcing McDowell or any other person to cease handling the products of Campbell or any other producer, processor or manufacturer, or of forcing McDowell to cease doing business with Campbell or any other person, or of forcing PTS or any other employer to recognize and bargain with Local 150 as the representative of its employees in the absence of a Section 9 certification of Local 150 as the majority representative thereof.

The Examiner also recommends that Local 17, its officers, agents, successors and assigns, be ordered to post at its offices and meeting halls, and at locations where notices to employees are customarily posted on the premises of employers with whom it has collective-bargaining relations, copies of the attached notice marked Appendix A,[13] and Local 150, its officers, agents, successors and assigns, be ordered to post at its offices and meeting halls, and at locations where notices are customarily posted on the premises of employers with whom it has collective-bargaining rela-

[13]In the event this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event the Board's Order is enforced by a decree of a United States Court of Appeals, the words " A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

tions, copies of the attached notice marked Appendix B.[14] Copies of said notice shall be furnished to the Respondent on forms provided by the Regional Director for Region 20 and shall be signed by a representative of each Local and posted immediately upon receipt thereof and maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by other material. The Regional Director for Region 20 shall be notified by the respective Locals within 20 days from the receipt of this Recommended Order what steps each has taken to comply herewith.[15]

The Examiner further recommends that Paragraph VII(c) of the complaint be dismissed.

Dated: Nov 4, 1968.

/s/ George Christensen
George Christensen
Trial Examiner

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[14]See fn. 13, *ibid.*

[15]In the event these recommendations are adopted by the Board, this provision shall be modified to read: "The Regional Director for Region 20 shall be notified by the respective Locals within 10 days from the date of this Order what steps each has taken to comply herewith."

Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1515

LOCAL 17, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
Petitioner,

vs.

PARAMOUNT TRANSPORT SYSTEMS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

The decision of the Court of Appeals is correct in every respect. There is no new or significant issue raised in the Petition which would justify review by this Court.

All issues involving liability of Petitioner were resolved against it by the District Court on Respond-

ent's motion for summary judgment. That judgment was affirmed in *Paramount Transport Systems v. Local 150 etc.,* 436 Fed.2d 1064 (9th Cir. 1971), on an interlocutory appeal and has been final for many years.

The issue of liability of the labor unions to Respondent having been resolved with finality in the earlier summary judgment, the sole issue before the District Court in this proceeding was damages. Petitioner does not claim that the award of damages was excessive, but rather, asserts other alleged errors.

OPINIONS OF THE COURTS BELOW

Petitioner makes accurate reference to the various opinions of the Courts and the NLRB below.

JURISDICTION

The jurisdiction of this Court is accurately stated in the Petition.

QUESTIONS PRESENTED

1. The first question, allegedly presented by the Petition is whether the decision of the NLRB trial examiner should have been excluded from evidence. Even though it is not stated in the petition, the remainder of that question must be whether reversible error resulted in any event.

2. The second question, as stated by Petitioner assumes the answer. Stated properly, the question is whether the record shows that the unlawful activity materially contributed to, or was a substantial factor in bringing about the damages.

ARGUMENT

1. THE QUESTION OF THE LIABILITY OF PETITIONER WAS CONCLUSIVELY SETTLED BY THE PRIOR SUMMARY JUDGMENT ON THAT ISSUE.

The NLRB trial examiner found that unlawful picketing and other interference were engaged in by Petitioner and Local 150, Chauffeurs, Teamsters etc., and by Local 17, and that as a proximate result of such unlawful activity Campbell Soup Company, one of Respondent's principal customers, ceased to do business with him. Petitioner does not deny that the NLRB so found (Brief of Petitioner, p. 16), but asserts that its finding in that regard was on an "immaterial issue", and should not have been given collateral estoppel effect.

What Petitioner insists upon refusing to recognize is the fact that the question of whether the NLRB's finding should be given collateral effect was the issue on the motion for partial summary judgment.

The District Judge, in ruling on the motion for partial summary judgment posed the issue as follows:

> "I. LEGAL ISSUE ON MOTION
>
> "At this state, the only question presented is:
>
> In a civil suit for damages allegedly suffered as a result of an unfair labor practice (an unlaw-

ful secondary boycott) is the determination of the NLRB that such an unfair labor practice has occurred to be considered res judicata and therefore binding on the District Court as trier of fact?"

Petitioner's Brief, Appendix, page 14.

The District Judge answered that question in the affirmative and granted the motion for partial summary judgment. That partial summary judgment was affirmed. *Paramount Transport System v. Local 150 etc.*, 436 Fed.2d 1064 (1971). Thus, the District Court and the Ninth Circuit Court of Appeals held that in the dispute between the Respondent and the unions, the findings of the NLRB were upon material issues supported by the evidence before it. Otherwise, the granting of the motion for partial summary judgment would have been error. The question of whether it was error has been forever foreclosed by the finality of the summary judgment affirmed in 1971 on the interlocutory appeal. That judgment is certainly the law of the case, and cannot be challenged here.

An additional reason for the denial of this Petition is that the District Court did not in fact foreclose the Petitioner from litigating the question of whether the conduct of the unions was a proximate cause of damage to Respondent. The jury was fully instructed on proximate cause. The jury was instructed that plaintiff could not recover unless it proved that some illegal act of each union was a proximate cause of some injury and consequent damage to the business of plaintiff. The jury was also instructed that no

damages could be assessed against any defendant unless it was established by a preponderance of the evidence that it was proximately caused by the illegal acts of that defendant. Reporter's Transcript, page 771.

In the exercise of an over abundance of caution, the District Judge also instructed the jury as follows:

"In order to award damages to plaintiff you must find that the conduct of Local 150 at National Ice on January 22, 1968, and the conduct of Local 17 at Bert McDowell on January 16, 1968 constitutes a proximate cause of the damages alleged to have been suffered by plaintiff."

"Plaintiff may not recover any losses which it suffered during the dispute with Local 150 on account of lawful primary or secondary activity engaged in by Local 150 or Local 17."

Reporter's Transcript, page 774.

Thus, as a practical matter, the issue of proximate cause, in instructions offered by defendants, was placed squarely before the jury. The jury was told that there could be no recovery of damages by the plaintiff unless proximate cause was shown by the evidence. The proximate cause had to be acts which were illegal, the District Judge said. Otherwise, there could be no recovery.

When stripped bare, the issue is not whether the District Court precluded defendants from arguing the proximate cause issue, because clearly, that was one of the issues before the jury. The naked issue is whether it was error to admit the findings of the trial

examiner. If it did nothing else, the decision of the U.S. Court of Appeals in *Paramount Transport Systems v. Local 150, supra,* settled the question of the sufficiency of his findings to support partial summary judgment on the question of liability. Had those findings not been on material issues, and had they not been sufficiently supported by substantial evidence, it follows that the summary judgment would have been improper. Petitioner, however, seems to desire to litigate the question of liability over again because the issues before the NLRB and those before the District Court were somehow not the same. This claim is relatively new, because in *Paramount Transport Systems v. Local 150 et al., supra,* the Court of Appeals observed:

> "No suggestion is made that the issues before the Board and before the Court were different, except in court the damage issue was added."
>
> Petitioner's Brief, Appendix, page 10.

CONCLUSION

The essential contentions made here by Petitioner have been made over the past eight years to the NLRB, the District Court on the motion for partial summary judgment on liability, and on the motion for new trial after the entry of the judgment on the verdict of the jury. It has also been made in the Court of Appeals three times—on the interlocutory appeal from the summary judgment on liability, on the appeal from the judgment on the verdict of the jury, and on the petition for rehearing. Each effort

to convince anyone of the merits of its claim has failed. This one too must fail because the judgment is fully supported by the law and the evidence. There is no basis whatsoever for this Court reviewing again that which has been subjected to administrative or judicial scrutiny at least six times without anyone except Petitioner claiming that its position has merit.

The Petition for a writ of certiorari should be denied.

Dated, Sacramento, California,
May 6, 1976.

Respectfully submitted,
NATHANIEL S. COLLEY,
Attorney for Respondent
Paramount Transport Systems.